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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

- against -

A $20 GOLD COIN, KNOWN AS A 1933 "DOUBLE EAGLE" MINTED AT THE UNITED STATES MINT IN PHILADELPHIA, PENNSYLVANIA,

Defendant-in-Rem.

96 Civ. 2527 (AKH)

REPLY MEMORANDUM OF LAW IN SUPPORT OF CLAIMANT STEPHEN C. FENTON'S MOTION FOR SUMMARY JUDGMENT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - A $20 GOLD COIN, KNOWN AS A 1933 "DOUBLE EAGLE" MINTED AT THE UNITED STATES MINT IN PHILADELPHIA, PENNSYLVANIA, Defendant-in-Rem.	96 Civ. 2527 (AKH)

REPLY MEMORANDUM OF LAW IN SUPPORT OF CLAIMANT STEPHEN C. FENTON'S MOTION FOR SUMMARY JUDGMENT

Claimant Stephen C. Fenton respectfully submits this reply memorandum of law in further support of his motion for summary judgment dismissing plaintiff's third amended forfeiture complaint.

PRELIMINARY STATEMENT

The government concedes virtually all of the factual assertions upon which Mr. Fenton relies in moving for summary judgment. The government nevertheless attempts to suggest a factual dispute by presenting allegations that are irrelevant, unsupported, inconsistent with information in the government's possession or incomplete in a manner that misleads.

The government admits, as it must, that there is no genuine issue of material fact as to whether the government physically possessed the 1933 Double Eagle, provided the coin to King Farouk or granted a license authorizing King Farouk to transport the coin to Egypt for his private numismatic collection. These facts establish that Mr. Fenton's importation of his 1933 Double Eagle did not violate the National Stolen Property Act. Nevertheless, the government offers the following unavailing arguments:

- The government commits a substantial portion of its brief to presenting its alleged proof that Mr. Fenton's 1933 Double Eagle was stolen from the Mint even though that allegation is assumed for purposes of this motion, which is based on the government's conduct after the coin left the Mint.
- The government argues that the decision to grant the license authorizing King Farouk to possess a 1933 Double Eagle and export that coin to Egypt was made by Theodore Belote, the Curator of History at the Smithsonian Institute, when it was made by the Director of the Mint under the authority of the Treasury Department.
- The government argues that the Treasury Department did not know whether it had issued 1933 Double Eagle gold coins to the public when it had that information in its exclusive possession.
- The government argues that the Treasury Department did not have the power to provide the 1933 Double Eagle to King Farouk when, in fact, it had the exclusive authority to regulate gold and gold coin.

Not surprisingly, the government argues that its declaratory judgment claim survives even if the Court grants Mr. Fenton's motion for summary judgment. The government bases this assertion on the principle that a purchaser cannot obtain good title of stolen property. The flaw to the government's argument, however, is it ignores the rather obvious proposition that the original owner of stolen property can transfer that property to a third-party. As a result, even if the 1933 Double Eagle had been stolen before the government regained possession, the government cannot evade the legal consequences of its actions, which include (i) providing the

1933 Double Eagle to King Farouk and authorizing him to export the coin to Egypt for his private collection, (ii) failing for nearly a decade to inform King Farouk of the government's position regarding the coin and seek its return and (iii) neglecting to take any action for over 40 years after making an unsuccessful demand of the Egyptian government for the return of the coin. In fact, the government cannot articulate a single legal or factual basis to refute Mr. Fenton's contention that by permitting King Farouk to enjoy all the benefits of ownership of the 1933 Double Eagle, the government has given up its rights to the coin.

In light of the failings of its main claim, the government attempts to resuscitate its mistaken argument that Mr. Fenton imported his 1933 Double Eagle by means of a knowingly false statement rather than dismiss this claim as the facts require. The government has manufactured the bizarre theory that Mr. Fenton purposely orchestrated the importation of his 1933 Double Eagle to take advantage of a non-essential document that an independent customs broker had created ten years earlier. The only "fact" the government offers in support of its far-fetched theory is an inference based upon its inaccurate assertion that Mr. Fenton invoked his rights under the Fifth Amendment and refused to answer questions involving his importation of the coin. In fact, Mr. Fenton answered all questions put to him regarding his importation of the 1933 Double Eagle.

Perhaps even more egregious, the government has offered for the first time in this 3½-year old litigation, and only in response to our motion for summary judgment, a new basis for its false statement claim that is not found in the complaint, and is inconsistent with the disclosures the government was required to make at the outset of these proceedings. Even if the claim had been properly asserted, the government's allegation that Mr. Fenton did something

wrong by listing a value for his 1933 Double Eagle based upon the purchase price of the coin is wrong as a matter of fact and law.

ARGUMENT

I

SUMMARY JUDGMENT MUST BE GRANTED BECAUSE MR. FENTON'S 1933 DOUBLE EAGLE DOES NOT CONSTITUTE STOLEN PROPERTY UNDER THE NATIONAL STOLEN PROPERTY ACT AND THE GOVERNMENT DOES NOT HAVE SUPERIOR TITLE TO THE COIN

A. Mr. Fenton's 1933 Double Eagle is the Farouk Coin

The government only half-heartedly argues that there is a material issue of fact as to whether Mr. Fenton's 1933 Double Eagle is the same coin once owned by King Farouk. The government does not even identify the actual "fact" at issue. Instead, it attempts to create the impression of a factual dispute by raising questions regarding non-critical issues, such as the precise manner in which the former Colonel whose family provided the coin to obtained that coin, the purported lack of paperwork documenting Mr. Fenton's purchase of the coin and Mr. Fenton and Andre de Clermont's knowledge of how the 1933 Double Eagle originally left the Mint.

Indeed, the government concedes virtually all of Mr. Fenton's arguments regarding his ownership of the King Farouk 1933 Double Eagle. First, the government does not dispute, because it cannot, that Mr. Fenton and Andre de Clermont purchased from many other coins and medals, including unique and one-of-a-kind coins and medals, that can be

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directly traced to King Farouk's numismatic collection. (See Government Br. ("Br.") at 35 ("Fenton and de Clermont have produced detailed documentary proof of purchases of other coins and other objects that were at one at one [sic] time part of King Farouk's numismatic collection . . .)). This concession is not surprising given that Messrs. Fenton and de Clermont were able to produce documents reflecting no fewer than **158** coins and medals that they purchased from and were once part of the King Farouk collection.[1] (See Berke Decl., Exh. EE)

Second, the government is unable to refute, and therefore simply ignores Mr. Fenton's contention that the King Farouk 1933 Double Eagle is the only remaining 1933 Double Eagle believed to be in private hands. In fact, the government does not respond to this position because it would have to contradict itself since that has been the government's position since at least 1953. (See Undated letter from the Secretary of the Treasury to the Secretary of State, attached as Exh. W to the Berke Decl. (the Secretary of the Treasury represented that the 1933 Double Eagle once owned by King Farouk "is believed to be the only one of its kind in the hands of the general public")). Nor does the government even attempt to offer an explanation for the Secret Service itself taking the position that Mr. Fenton's 1933 Double Eagle is the King Farouk coin. (See February 12, 1996 Draft Secret Service Press Release, attached as Exh. X to the Berke Decl. ("The 1933 Augustus Saint-Gaudens double eagle $20 gold coin recovered by the U.S. Secret Service on February 8, 1996 is believed to be the coin once owned by King Farouk. After Secret Service agents researched U.S. Treasury Department records held in the National

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[1] That proof is made even stronger by the fact that all the former Farouk coins purchased by Messrs. de Clermont and Fenton, including the 1933 Double Eagle, appear to have been among the unsold coins from Sotheby & Co.'s auction of the King Farouk numismatic collection.

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Archives, College Park, Maryland, and in the Washington Record Center, Suitland, Maryland, they believe that the coin Mr. Parrino spoke of is the 'King Farouk' coin.")).

Although the government makes a de facto concession that Mr. Fenton's coin must be from the King Farouk collection (like every other coin and medal purchased by Messrs. Fenton and/or de Clermont), the government refuses to explicitly concede that point. Instead, it makes an argument that could be characterized as "the proof is not the best it could be." While Messrs. de Clermont and Fenton's uncontroverted testimony regarding their dealings with . and the scores of former Farouk coins they purchased establish a direct link to the Farouk collection, the government quibbles with the details surrounding the manner in which obtained the 1933 Double Eagle from the Farouk collection. The government's criticism is a rather weak one, however, since whatever the precise details, obviously had a source that was able to provide a substantial number of coins from the King Farouk numismatic collection.

Similarly, while acknowledging that the documents Messrs. Fenton and de Clermont produced with respect to the former Farouk coins they purchased from were "detailed, specific, and fairly complete," (Br. at 34), the government faults Mr. de Clermont for not having documentation regarding the 1933 Double Eagle. That explanation is provided by both Messrs. de Clermont and Fenton, who explained that unlike the other Farouk coins, Mr. Fenton purchased the 1933 Double Eagle on his own because of its higher price. (See de Clermont Dep. at 254-58; Fenton Dep. at 259-63, attached as Exh. B to the Berke Suppl. Decl.). Although Mr. de Clermont was to receive a commission for his efforts in brokering the transaction, he did not jointly purchase the coin and, therefore, did not have a receipt for the sale.

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(See de Clermont Dep. at 267, attached as Exh. A to the Berke Suppl. Decl.). In addition, the government has ignored that Mr. Fenton did produce proof of his wire transfer to for the coin, as well as a purchase confirmation. (See Berke Suppl. Decl., Exhs. C and D). The government's position is also curious given that there is no dispute that Mr. Fenton did in fact purchase a 1933 Double Eagle. In light of the uncontradicted testimony of Messrs. Fenton and de Clermont regarding the circumstances surrounding Mr. Fenton's purchase of the coin, the government's argument that "the absence of documentation for the 1933 Double Eagle raises a genuine question as to the true source of this particular coin" is frivolous. [2]

B. Mr. Fenton's 1933 Double Eagle Does Not Constitute Stolen Property Since The Government Issued a License Authorizing Its Private Possession and Voluntarily Provided The Coin to A Third-Party

The government concedes, as it must, that there is no genuine issue of material fact as to whether the government physically possessed the 1933 Double Eagle, provided the coin to King Farouk and granted a license authorizing King Farouk to transport the coin to Egypt for his private numismatic collection. In light of this concession, logic and common sense are the biggest hurdles the government must clear in arguing that the license that the Treasury Department granted to King Farouk did not actually constitute authorization for King Farouk to enjoy all the benefits of ownership of that coin. Nevertheless, the government makes a tortured attempt to avoid accepting responsibility for its own conduct in (i) providing the 1933 Double

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2 The government's final argument that there is a material issue on this point because Messrs. Fenton and de Clermont may have known the history of the 1933 Double Eagle when Mr. Fenton purchased it from , (Br. at 36), is a non-sequitur. While the government argues that this may be a reason Mr. de Clermont did not create any documents regarding the coin, it has absolutely no bearing on the clear proof that this 1933 Double Eagle is the Farouk coin.

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Eagle to King Farouk and authorizing him to export the coin to Egypt for his private collection. as well as (ii) failing for nearly a decade to inform King Farouk of the government's position regarding the coin and seek its return and (iii) after making an unsuccessful demand of the Egyptian government for the return of the coin. failing to take any action for over 40 years until instituting the present action. These efforts, however, only serve to illustrate that the government cannot articulate a single legal or factual basis to refute Mr. Fenton's contention that the government has given up its rights to claim ownership of that coin.

1. The Treasury Department Granted a License Authorizing the Private Possession of the 1933 Double Eagle

The government attempts to characterize the issuance of the license establishing King Farouk's right to lawfully possess and export his 1933 Double Eagle as an erroneous "determination," "conclusion" or "assessment" by Theodore Belote, a Smithsonian employee. (See Br. at 48). The government thus argues that "[b]ased on Mr. Belote's incorrect conclusion regarding the coin presented by the Egyptian Royal legation, export license TGL-170 was issued to King Farouk on February 29, 1944," (Id. at 41) and "an export license was granted for the King Farouk 1933 Double Eagle based on Mr. Belote's assessment that it was within the [applicable] exemption." (Id. at 48). Quite clearly, however, the license was not issued by Mr. Belote; rather it was granted by the Treasury Department. (See January 15, 1954 Memorandum from SAIC Whitaker, N.Y. to Chief of Secret Service ("The Treasury Department licensed the exportation of one of the coins to King Farouk of Egypt."), attached as Exh. U to the Berke. Decl.). Moreover, Mr. Belote answered the questions framed to him by the Director of the Mint correctly: the 1933 Double Eagle was of recognized value to collectors of rare and unusual coins. Moreover, as the government is forced to admit, "[t]he Treasury Department had

delegated to the Gold Unit at the United States Mint the responsibility for determining numismatic questions relating to export of gold coin." (See Br. at 39.) Given that it was the Treasury Department that granted the license for the 1933 Double Eagle, it is of no moment what Mr. Belote knew or did not know regarding whether any 1933 Double Eagles had been given to the public.

The reason the government commits a substantial portion of its argument to chronicling the actions and state of mind of Mr. Belote in reviewing the Farouk 1933 Double Eagle, (see id. at 39-41, 49-50), is obvious. To do otherwise would require the government to clearly articulate a legal basis supporting its actual argument that the Treasury Department license authorizing King Farouk to retain and export the 1933 Double Eagle simply should be ignored because in issuing the license, the Treasury Department did not "realize" that it had not issued any 1933 Double Eagles to the public. (See id. at 38).

In fact, the phony assumption upon which all of the governments arguments are based is revealed in the following statement: "it cannot be disputed that **the Government** had no knowledge that uncirculated 1933 $20 Double Eagles had been stolen from the Mint at the time it issued the export license to King Farouk." (See id. at 58 (emphasis added)). To the contrary, **the government** knew whether any 1933 Double Eagles were released to the public in the way that the government or any entity can know anything -- it had information in its possession, in fact exclusive possession, as to that fact. When King Farouk gave the government a 1933 Double Eagle and asked for permission to take it to Egypt for his private use, **the government** certainly "knew" at that juncture (i) that at least one 1933 Double Eagle was in private hands and (ii) whether the government had previously released any 1933 Double Eagles to the public. As a

result, the government can no more claim that it did not know the facts surrounding the 1933 Double Eagle than a public company can claim it does not know the falsity of a statement simply because the specific company official that made the false statement was unaware of the relevant information in the company's possession. Obviously, a company cannot claim it lacked knowledge of a fact simply because the corporate officer acting on its behalf lacked that knowledge. The government should be held at least to this standard, if not a higher one. This is not even a situation where the question presented is whether one agency of the government had information regarding the actions of another agency. It was the Treasury Department that had information regarding whether it released any 1933 Double Eagles to the public, and it was the Treasury Department that authorized King Farouk's export of the coin for his private collection.[3]

Moreover, the government wholly ignores the role of Nellie Tayloe Ross and her knowledge of the relevant events of 1933. Ms. Ross was President Roosevelt's first Director of the United States Mint and began her 20-year term in **1933**. (See Compton's Encyclopedia Online Entry for Nellie Tayloe Ross, attached as Exh. F to the Berke Suppl. Decl.). It was Ms. Ross who received the King Farouk 1933 Double Eagle, provided it to Mr. Belote for his opinion regarding whether it had special value to collectors of rare and unusual coin, authorized the granting of License No. TGL-11-1709 and then returned the 1933 Double Eagle to King Farouk.

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3 Beyond the fact that the Treasury Department had in its exclusive possession information regarding the number of 1933 coins released to the public, the government's argument that the Treasury Department did not realize that 1933 Double Eagles had allegedly been stolen from the Mint until after the Farouk license was granted is also misleading for another reason. It was after the granting of the license that the government decided to take any action regarding the 1933 Double Eagles. In fact, prior to February 29, 1944, when the license was granted, 1933 Double Eagles were openly traded and exhibited. For example, the April, 1937 edition of The Numismatist advertises that F.C.C. Boyd exhibited a 1933 Double Eagle and Eagle at the New York Numismatist Club. (See Berke Suppl. Decl., Exh. E).

(See Berke Decl., Exhs. Q, R & S). The government fails to address Ms. Ross' role in granting the license, let alone her personal knowledge and involvement in the events of 1933. Rather, the government addresses only the state of mind of the Acting Director of the Mint, who was involved in the events following the issuance of the license in March, 1944, (see Br. at 41-42), and Mr. Belote. The government's omission is not surprising given that its argument that the Treasury Department officials involved didn't "know" about events in 1933 and 1934 is particularly weak in light of Ms. Ross' role in granting the license.

In addition, the government is unable to offer **a single** case supporting its position that the license for the 1933 Double Eagle should be rendered a nullity because "ownership was not a factor considered by Belote, nor [sic] by the Treasury Department" in granting the license. (See id. at 50). The information that the Treasury Department may or may not have considered in authorizing King Farouk to take his coin to Egypt for his private collection has no impact on the effect of the Treasury Department's actions in granting a license to King Farouk for his 1933 Double Eagle.

Similarly, the government's argument that the Treasury Department lacked the power to authorize King Farouk's possession of the 1933 Double Eagle is plainly wrong. Under all the laws, orders and regulations regulating the ownership of gold after 1933, the Treasury Department was the governmental agency invested with the authority to regulate the ownership of gold and gold coins. (See Exec. Order 6260 §§ 3-9 (August 28, 1993), attached as Exh. L to the Berke Decl.). The government's argument that the Treasury Department had no more authority to provide the 1933 Double Eagle to an individual than it had to give away office equipment, (see Br. at 55-56), illustrates the extent to which the government's position misses

the mark. Obviously, the Treasury Department had authority to regulate gold and gold coins, while presumably it did not have a similar grant of authority regarding government office equipment.

The government also offers no response to Mr. Fenton's argument regarding the significance of the 1972 United States law authorizing the forfeiture of any pre-Columbian artifacts imported into the United States, except any such artifact for which the country of origin issued a license authorizing its exportation. See 19 U.S.C. §§ 2091-2095. Obviously, the exemption was included because a sovereign cannot claim the rights and benefits of ownership to property for which it issues a license authorizing a private individual to take that property to a foreign land for his own use.[4]

Instead of addressing this point, throughout its brief, the government mischaracterizes Mr. Fenton's argument as a claim that stolen goods lose their stolen character if the government issues an export license. The issue, however, is not stolen goods in general. Rather, the issue is that when the United States authorizes an individual to export for his personal use merchandise alleged to have been stolen **from the United States**, that property cannot constitute stolen property under the NSPA or any other formulation. The result would be the same whether it involves the government or a private business that disposes of its property by

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[4] The government's argument that Mr. Fenton bases his claim on the premise that the United States became the legal owner of the 1933 Double Eagle because of the regulatory orders and statues requiring the delivery of all gold to the United States and prohibiting the issuance of gold coin into circulation, (see Br. at 48-49), is a straw man. Mr. Fenton is not challenging the government's statement that "[t]he United States became owner of the defendant-in-rem 1933 Double Eagle the moment it was struck." (See id. at 49). Rather, just as any owner may transfer its property to a third party, the government did exactly that when issuing a license for King Farouk to possess and export the 1933 Double Eagle.

providing it to a third-party. Given the obviousness of this point, it is not surprising that the government fails to cite any cases in support of its position, and does not even attempt to distinguish the cases establishing that there can be no violation of the National Stolen Property Act ("NSPA") if the property was disposed of by the owner. See, e.g., United States v. Bennett, 665 F.2d 16, 22 (2d Cir. 1981) ("Because the concept of 'stolen' property requires an interference with the property rights of its owner, property that has been transported, sold, or otherwise disposed of, with the consent of the owner cannot be considered 'stolen' within the meaning of §§ 2312-2315."). In our case, the government having disposed of the 1933 Double Eagle by authorizing King Farouk to take it for his private collection in Egypt, cannot now be heard to complain that the property should be subject to forfeiture under the NSPA.

The hypothetical offered by the government to justify this forfeiture action further shows the weakness and illogic of its position. The government hypothesizes that "if Mehl alleged that King Farouk had stolen the 1933 Double Eagle from him, the export license would hardly be considered probative of King Farouk's title." (Br. at 50). Once again, the obvious difference between that example and what actually occurred is the simple fact that the government has the authority to convey property that **the government** owns to a third-party, but it does not have the same authority to transfer a private citizen's property rights to a third-party. Moreover, despite the government's claim that Mr. Fenton advocates some kind of "trick" here, (see id. at 53), the government does not even claim that King Farouk did anything improper or in any way misled the government. To the contrary, the undisputed evidence clearly establishes that King Farouk followed the applicable regulations by disclosing his possession of the 1933 Double Eagle, physically providing the gold coin to the Treasury Department and seeking a license for its export.

2. The Government Regained Possession of the 1933 Double Eagle And Therefore Cannot Claim That It Is Stolen Property

The government's unsuccessful attempt to distinguish the well-established common law principle that stolen goods lose their stolen character when recovered by the government on behalf of the owner only highlights that the facts of our case present an even stronger argument for application of that principle.

The government correctly notes that application of this principle has generally arisen in circumstances where the police have recovered stolen property immediately prior to the property being delivered to a person who believes the property to be stolen. See, e.g. United States v. Monasterski, 567 F.2d 677, 681 (6th Cir. 1977); United States v. Warshawsky, 818 F. Supp. 181, 186 (E.D. Mich. 1993), aff'd in part, rev'd in part on other grounds, 20 F.3d 204 (6th Cir. 1994). However, the government is incorrect in arguing that a majority of the Circuits have greatly narrowed the common law. Rather, as the cases cited by the government make clear, every Circuit to consider this issue reaffirmed this common-law principle. The cases that the government claims narrowed the principle simply applied the common law and concluded that when the police come in contact with property as part of an investigative surveillance of that property, but have not yet recovered that property, the police did not have possession of the stolen goods. See United States v. Muzii, 676 F.2d 919, 923 (2d Cir. 1982) (recognizing the validity of the common law rule while holding that where law enforcement merely conducts surveillance of stolen goods, the owner of the stolen goods did not have actual or constructive possession of the goods); United States v. Dove, 629 F.2d 325, 333 (4th Cir. 1980) (holding that there was no "'actual, physical possession' by the true owner, his actual agent or his presumed agent," of the property").

The government's attempt to distinguish these cases and the long-standing common law principle reaffirmed in each is entirely misguided. While the government attaches great significance to the fact that its possession and control over the 1933 Double Eagle was brief before it gave the coin to King Farouk, there can be no dispute that the government's possession of the 1933 Double Eagle constituted "actual, physical possession by the [purportedly] true owner," see Dove, 629 F.2d at 333, and that coin was thereby "relieved of [its] taint." Id. If anything, our case presents the strongest set of facts requiring application of the common law principle since it was not the government recovering property as a **presumed agent for the owner** of the property, but rather it was the government recovering the property as the **actual owner** of the property. Moreover, unlike the other cases that reaffirmed this principle, the recipient of the property in our case, King Farouk, was aware of the government's involvement (because he instigated it) and did not believe he was being given stolen property.

Once again, the government points to no case in support of its position that this common law principle that can be traced back to nineteenth century England should not be applied here. Instead, it offers a hypothetical that, if anything, reveals the flaw in its argument. The government argues that the common law should not be applied here because to do so would mean that a person could pass any stolen property through the United States Postal Service and claim that the property lost its taint because the government possessed it, even if the employees did not know the goods are stolen. (Br. at 52). Unlike this rather absurd hypothetical, however, the 1933 Double Eagle was not just any "stolen property," but rather property that the government claims was stolen from it. Moreover, in our case, the governmental agency that regained the property knew it had a 1933 Double Eagle in its possession, and had information in its exclusive control regarding whether that coin was stolen property.

3. The Government's Superior Title Claim Fails For the Same Reasons

Recognizing that its opposition to Mr. Fenton's motion for summary judgment is weak, the government attempts to change the subject. Indeed, the government's desperate argument that even if the Court grants Mr. Fenton's motion for summary judgment, the government's declaratory judgment claim should stand, (see Br. at 15), is meritless. The government's argument that the Treasury Department's actions in giving the 1933 to King Farouk to take to Egypt for his private collection has no bearing on the government's claim to that coin is plainly wrong under clearly established title law that the government neglects to mention. In fact, an **accurate and complete** analysis of the laws governing transfer of title provides additional support for granting summary judgment and requiring the return of the 1933 Double Eagle to Mr. Fenton.

Despite the fact that the question of whether Mr. Fenton's 1933 Double Eagle was stolen from the Mint in the 1930s is irrelevant to Mr. Fenton's summary judgment motion -- since Mr. Fenton assumes for purposes of the motion that the government's allegation that the coin was stolen is correct -- the government commits over 15 pages of its brief to seeking to show that the coin was stolen in a transparent attempt to suggest there is a factual dispute relevant to Mr. Fenton's motion for summary judgment when there is none. Even if arguendo the coin was stolen from the Mint in the 1930s and title to the coin remained with the United States government, which Mr. Fenton contests,[5] the government's claimed superior title would have ceased when it authorized King Farouk's ownership of the coin, as well as upon its issuance of the 1954 Treasury regulation and the 1965 Coinage Act. While the government's lengthy

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5 See Section 4 below.

recitation of the law regarding the good faith purchase of stolen property may have some relevance to Mr. Barnard's 1933 Double Eagle in 1947 (assuming the coin was stolen), see United States v. Barnard, 72 F. Supp. 531 (W.D. Tenn. 1947), it has absolutely no bearing on the Farouk/ Fenton 1933 Double Eagle in 2000.

The government's position is particularly surprising given that in seeking leave to amend its complaint to add its declaratory judgment claim of superior title, the government itself asserted that "[t]he proposed amendment does **not** inject any new issues into the case. The issue of which party holds title to the coin is basic to the forfeiture allegations already alleged." (See March 4, 1999 Letter from Jane A. Levine to the Honorable Alvin K. Hellerstein, attached as Exh. G to the Berke Suppl. Decl.) (emphasis added)). Accordingly, for the same reasons discussed in Mr. Fenton's moving papers and above, the government does not have a superior title claim to Mr. Fenton's 1933 Double Eagle.

a. The government cannot claim it has superior title to the 1933 Double Eagle after it transferred that property to King Farouk

It is a fundamental and indisputable proposition of property law that when an owner transfers personal property to another, title passes to the transferee. See, e.g. Phelps v. McQuade, 220 N.Y. 232, 234 (1917). Nevertheless, the government ignores this basic tenet in arguing that title can never be transferred from property that was once stolen. (See Br. at 12-13, 56). While the government is correct that a good faith purchaser cannot acquire clear, superior title from a thief, (see id. at 12, 56), the fatal flaw to the government's argument is that it ignores the rather obvious proposition that the original owner of stolen property can transfer that property to a third-party. As even the cases relied upon by the government expressly recognize,

the rationale for the proposition of law cited the government is that "[o]nly the true owner's own conduct, or the operation of law . . . can act to divest that true owner of title in his property." Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 833 (E.D.N.Y. 1981), (citing 3 Samuel Williston, The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act § 23-12 (1948) aff'd, 678 F.2d 1150 (2d Cir. 1982)).

Thus, "the fundamental maxim of property law [is] that the owner of a property interest may dispose of all or part of that interest as he sees fit.". See Phillips v. Washington Legal Found., 524 U.S. 156, 167 (1998); see also Broat v. Broat, 18 N.Y.S.2d 709, 713-14 (Sup. Ct. Broome Co. 1940) (owner had right to dispose of property as saw fit); 87 N.Y. Jur. 2d Property § 14 (1990) ("[O]ne of the incidents of ownership of property is the right of alienation, that is, the right to convey or transfer the property."). As demonstrated in Mr. Fenton's moving brief and above, the United States Treasury Department clearly transferred the 1933 Double Eagle to King Farouk. As a result, assuming for purposes of this motion that the government was the owner of the coin at that time, under long-established principles, that transfer of property was "effective to endow the transferee with all the attributes of ownership." Union Guardian Trust Co. v. Broadway Nat'l Bank & Trust Co., 13 Misc. 16, 18, 245 N.Y.S. 2, 5 (Sup. Ct. N.Y. Co. 1930).

b. The principle of adverse possession further illustrates the failings of the government's superior title claim

The long-standing principle of adverse possession further illustrates the failings of the government's superior title claim. "Except as provided by statute, title to almost any kind of property may be acquired or lost by adverse possession or prescription." 2 N.Y. Jur. 2d Adverse Possession § 86 (1988). The acquisition of title to personal property by adverse possession is

based on the expiration of a statute of limitations. O'Keeffe v. Snyder, 416 A. 2d 862, 870-71 (N.J. 1980) (citing Robert Brown, The Law of Personal Property § 4.1, at 33 (3d ed. 1975)).[6] The New York Court of Appeals has stated that

> it seems to be the generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner. . . . The English and American statutes of limitation have in many cases the same effect; and, if there is any conflict in the decisions upon the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period, which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title -- a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title.

Lightfoot v. Davis, 198 N.Y. 261, 265 (1910). See also 2 NY Jur. 2d Adverse Possession § 86 (1998) ("With respect to personal property, where one has had the peaceable, undisturbed, and open possession of it, under an assertion of ownership, for the 6-year period which bars an action for its recovery by the real owner, he or she has acquired a good title or at least a superior title to that of the owner.") (emphasis added); O'Hara v. Wallace, 83 Misc. 2d 383, 385, 371 N.Y.S.2d 570, 574 (Sup. Ct. Suffolk Co. 1975) ("Adverse possession is a doctrine of inchoate title which might ripen into perfect title by the lapse of time."), modified on other grounds, 52 A.D. 2d 622, 371 N.Y.S. 2d 350 (2d Dep't 1976).

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6 Although adverse possession is generally unavailable against the state with respect to title to state-owned lands, see People v. Baldwin, 233 N.Y. 672 (1922), that same restriction does not apply to personal property owned by the government. The rationale for the general inapplicability of adverse possession to state-owned lands -- that the lands are held by the sovereign in trust for the public -- does not extend to government-owned personal and other property. See People v. System Properties, Inc., 2 N.Y.2d 330, 160 N.Y.S.2d 859, 866 (1957) (holding the rule to be inapplicable to an adverse possession claim of title to a dam where it did not interfere with a public use).

"Ordinarily, the period of adverse holding required for obtaining title to personal property by adverse possession is the statutory period that bars an action for the recovery of personal property by the real owner." 3 Am. Jur. 2d Adverse Possession § 14 (1986). At the time the government was aware of King Farouk's adverse possession of the 1933 Double Eagle, there was a six-year statute of limitations for the recovery of chattel under the relevant section of the Civil Practice Act. See Kunstsammlungen Zu Weimar, 536 F. Supp. at 847 n.18; Pine Hill Concrete Mix Corp. v. Alto Corp., 25 A.D. 2d 608, 609, 267 N.Y.S.2d 658, 659 (4th Dep't 1966), aff'd, 19 N.Y. 2d 770, 279 N.Y.S. 2d 526 (1967).[7]

Looking to the elements that must be satisfied for the adverse possession doctrine to be invoked further establishes that the government's title analysis does not advance its position. Generally, the five elements necessary for adverse possession to vest title are that the possession be: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the statutory period. 2 N.Y. Jur. 2d Adverse Possession § 6 (1998).

First, "hostility" simply means the true owner has not consented to the possession. Under even the government's theory, while the government consented to King Farouk's possession of the 1933 Double Eagle at the time it gave him the coin on March 11, 1944, the government did not consent to King Farouk's ownership thereafter. (See Br. at 42-44). Furthermore, King Farouk's possession was clearly under a claim of right of ownership of the 1933 Double Eagle. Second, King Farouk had actual possession of the 1933 Double Eagle.

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7 The current statute of limitations period for recovery of chattel is three years. N.Y. CPLR 214(3) (McKinney 1990).

Third, King Farouk's possession of the 1933 Double Eagle was "open" and "notorious," which simply means "such possession as will permit the true owner to have notice in order that 'he may act to recover his property and protect his title from the adverse possessor.'" Gee v. CBS. Inc., 471 F. Supp. 600, 655 (E.D. Pa.) (quoting III American Law of Property § 15.1 et seq., at 768 (1952)), aff'd mem., 612 F. 2d 572 (3d Cir. 1979). Clearly, the government had notice of King Farouk's possession of the Double Eagle as of 1944.[8] Fourth, King Farouk had exclusive possession of the 1933 Double Eagle. Fifth, King Farouk had continuous possession of the 1933 Double Eagle for the statutory period of six years from 1944 to at least 1950.[9] Consequently, even under the government's theory, applying the principles underlying the adverse possession doctrine supports the conclusion that King Farouk obtained title to the 1933 Double Eagle that was paramount to that of the "true owner" of the coin. See Lightfoot, 198 N.Y. at 265; see also 51 Am. Jur. 2d Limitations of Actions § 90 (1970) ("Where the title to personal property has been acquired by adverse possession, the running of the statute will be a good defense in replevin and will support an action by the adverse holder for the recovery of possession even against the original owner.").

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8 The government claims that "Fenton misleadingly argues that the government made no effort to recover the King Farouk coin, but the evidence demonstrates otherwise." (Br. at 42). The government asserts that the documents show the government's consistent desire to obtain the coin and the steps taken "within the government toward recovering the King Farouk 1933 Double Eagle." (See id.(emphasis added)). The government concedes, however, that what the government did within the government was something different from what it did outside it given that they made no effort to recover the 1933 Double Eagle until nearly a decade later. (See id. at 42-44).

9 Although beyond the statutory period of six years, the subsequent ownership by the Egyptian government of the 1933 Double Eagle would not have otherwise defeated the element of continuous possession since "successive occupations of those in privity with each other may be tacked together to constitute the statutory period." 3 Am. Jur. 2d Adverse Possession § 80 (1986).

c. The statute of limitations on the government's declaratory judgment claim against the coin has expired

The government purports to seek "a declaratory judgment pursuant to 28 U.S.C. § 2201 that it is and has at all times been the legal title owner of the 1933 Double Eagle $20 gold coin." (See Third Amended Forfeiture Compl. ¶ 31). The government bases this declaratory judgment ruling on CPLR Article 71, the replevin statute. (See January 26, 1999 Letter from Jane A. Levine to the Honorable Alvin K. Hellerstein, attached as Exh. H to the Berke Suppl. Decl.).

An action for declaratory judgment is barred to the same extent as the applicable statute of limitations bars the concurrent legal remedy since actions for declaratory judgment do not have their own statute of limitations. See, e.g., Algrant v. Evergreen Valley Nurseries Ltd. Partnership, 126 F.3d 178, 181 (3d Cir. 1997). Consequently, the relevant statute of limitations period for the government's declaratory judgment claim is that for CPLR Article 71, the recovery of chattel, which, as discussed infra, was six years during the relevant time period.

A proliferation of stolen art cases adjudicated in New York state and federal courts led the New York Court of Appeals to clearly articulate what an action for recovery of chattel accrues. See Solomon R. Guggenheim Found. v. Lubber, 77 N.Y.2d 311, 567 N.Y.S. 2d 623 (N.Y. 1991). In Guggenheim Foundation, the Museum curators believed they had misplaced a Channel painting in the 1960s, then considered it lost or stolen in the 1970s and finally discovered the painting's whereabouts in 1986 after having made little effort to try and trace it. The Court of Appeals spoke to the accrual of an action for replevin in New York:

> The rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true

owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it.

77 N.Y.2d at 317-18, 567 N.Y.S.2d at 626.[10]

Here, the undisputed facts are the following: the government knew of King Farouk's possession of the allegedly stolen 1933 Double Eagle since at least 1944; the government made a demand for return of the Farouk 1933 Double Eagle in 1954 and was refused; and the government did not seek to legally recover the coin until this action was commenced in 1996. Consequently, application of these standards to the government's conduct at the time would mean the statute of limitations expired by 1960.

4. The Government Overstates the Strength of Its Evidence that Mr. Fenton's 1933 Double Eagle Was Stolen from the Mint in the 1930s

Although not relevant to this motion and an academic question at this stage given that Mr. Fenton is entitled to the return of his coin in light of events in the 1940s, 1950s and 1960s, the record should reflect that the government's claims regarding the strength of its proof that Mr. Fenton's 1933 Double Eagle had been stolen from the Mint are greatly exaggerated. In fact, there is substantial evidence not relevant to this motion, that 1933 Double Eagles left the Mint through innocent means.

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10 Several other states, including New Jersey, Indiana, Pennsylvania, Maryland and the District of Columbia, apply the "discovery" rule in determining when a true owner should be able to maintain a replevin action against a bona fide purchaser beyond the statutorily provided limitations period. See Erisoty v. Rizik, No. Civ. A. 93-6215, 1995 WL 91406, at *10 & n.5 (E.D. Pa. Feb. 23, 1995); O'Keeffe, 416 F.2d at 875. As a result, if the law of the District of Columbia were used, applying the discovery rule to the facts of our case would mean that the statute of limitations expired in 1950, six years after the government was aware of King Farouk's possession of the 1933 Double Eagle.

Moreover, the government misleadingly fails to present known facts that raise substantial doubt as to what the government purports was the Secret Service's "**conclusion,**" (Br. at 18), that Mr. Fenton's coin was stolen from the Mint by the Mint cashier, George McCann. Indeed, in 1953, the Secret Service conceded that despite having circumstantial evidence causing it to suspect Mr. Mc.Cann's involvement, its "investigation did not **conclusively** establish when, how or by whom the coins found in circulation were taken from the Philadelphia Mint." (See Berke Decl., Exh. T). In addition, even the government concedes that it can't establish that the coin was stolen given that after laying out its circumstantial "evidence" against Mr. McCann, it posits a different and mutually exclusive theory as to how the coin may have left the Mint: "someone connected to the Assay Commission also could have 'switched' another gold coin for one of the 1933 Double Eagles." (Br. at 27-28).

At bottom, the government's argument is that "because the 1933 Double Eagle gold coins never became legal tender, any 1933 Double Eagle in private hands "must have been stolen from the Mint." (See Government's August 26, 1996 Letter at 1, attached as Exh. D to the Berke Decl.). In the government's own words, "the government is alleging (and has been from the start) that the 1933 Double Eagle in the instant case was per se stolen from the Mint because it simply could not have been removed by any legal means." (Id.). In fact, if a trial had been necessary, Mr. Fenton would have established the "legal means" by which a 1933 Double Eagle could "have been removed" from the Mint.[11]

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11 The government's attempt to use the holding in Barnard, 72 F. Supp. at 531 to fill the holes in its proof that the all 1933 Double Eagles must have been stolen from the Mint is unavailing. In that case, the defendant did not dispute that the coin left the mint through unlawful means. See id. at 531. As a result, "the decisive question, in the Court's opinion [was] whether the coin in dispute, after having been minted, was issued as money

Lastly, the government relies upon layers upon layers of hearsay to attempt to prove that Mr. Fenton's 1933 Double Eagle did not leave the Mint through lawful means. There is substantial, unassailable evidence that the hearsay documentation relied upon by the government in making its claims is wholly unreliable, which beyond casting further doubt upon those claims renders that proof inadmissible at any trial. See United States v. Pole No. 3172, 852 F.2d 636, 639 (1st Cir. 1988) (disapproving district court's reliance on government's third-hand allegations; "[w]hile a probable cause determination may be based on otherwise inadmissible evidence, the evidence must still be found reliable"); United States v. Parcel of Land & Residence, 914 F.2d 1, 5 (1st Cir. 1990) (for hearsay to be considered "by a court in evaluating probable cause to forfeit, there must be a substantial basis for crediting the hearsay"); United States v. $191,910 in United States Currency, 788 F. Supp. 1090, 1097 (N.D. Cal. 1992) (granting claimant's motion for summary judgment; stating that "mere conclusory statements, even hearsay ones, are not sufficient to oppose a motion for summary judgment"), aff'd, 16 F.3d 1051 (9th Cir. 1994).

C. The United States Has Authorized the Private Possession of All Gold Coins, Including the 1933 Double Eagle

1. In 1954, The Treasury Department Issued An Order Permitting The Private Ownership Of All Gold Coins

The government clearly recognizes the failings of its legal position with regard to the 1954 Treasury Order since that can be the only explanation for its reliance on the frivolous

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or currency of the United States, or whether the status of the same was that of a chattel." Id. at 531-32. The defendant did not present evidence regarding the lawful manner in which 1933 Double Eagles could have left the mint even if not issued as currency (presumably because he did not have access to the government documents obtained by Mr. Fenton). As a result, the Court's analysis has little relevance to this case.

factual argument based on the fact that 100,000 1933 Double Eagles were struck before April 5, 1933. While the government concedes that the 1933 Double Eagles are indistinguishable, it nevertheless seeks to place the burden on Mr. Fenton to prove that his 1933 Double Eagle was not one of these 100,000 coins minted prior to April 5, 1933. Indeed, the government's argument that because 345,500 coins were minted after April 5, 1933, Mr. Fenton's coin was **probably** minted after April 5, 1933 without any proof that this was the case is mere guesswork that is an inadequate substitute for actual proof.

The government next engages in a hyper-technical interpretation and plain misreading of the 1954 Treasury Order. Although the government correctly notes that the 1954 Treasury Order authorized the private ownership of all gold coins made prior to April 5, 1933, the government attempts to read into the order a limitation that simply does not exist — that it applies only to coins that were both made prior to April 5, 1933 and officially issued as circulated currency. While the preamble recognizes that certain circulated coins were not returned to the United States Treasury despite regulations requiring such action and that other gold coins held abroad were not subject to delivery, the Order does not limit its directive to only a subclass of coins, and certainly does not contain the exemption that the government somehow reads into it — that it applies to all coins except the 1933 Double Eagle and presumably any other coin that the government claims was not issued as part of an official circulation. (See 19 Fed. Reg. 135 (1954), attached as Exh. II to the Berke Decl.).

To the contrary, the Order specifically refers only to coins "made prior to April 5, 1933," as opposed to "made and officially issued prior to April 5, 1933," as the government would somehow read the Order, notwithstanding its plain language. In fact, it is a standard rule of statutory construction that if a statute or governmental directive by its plain terms is

unambiguous then the law must be enforced consistent with that meaning. See, e.g., Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (Rehnquist, C.J.) (unanimous decision) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."). Here, there is no ambiguity that the Treasury Department's Order authorizes dealers and collectors to possess all gold coins made prior to the United States being taken off the gold standard. The Order is sweeping precisely to remove any ambiguity regarding what coins can be freely sold and traded by numismatists and collectors. Moreover, the Treasury Department could have excluded the 1933 Double Eagle from the reach of this 1954 Order if it so intended.

In addition, as the amicus curiae submission by the Professional Numismatic Guild makes clear, there are many examples of coins minted by the United States that were not authorized for issuance as currency or otherwise released to the public that are presently openly and freely traded by numismatists, and were so traded in 1954, without interference by the government. The import of these examples is that the broad sweep of the Treasury regulations is entirely consistent with the long-standing policy of the United States government to not interfere with the purchase and sale of coins by numismatists. The government's interpretation that the 1954 Order renders all coins permissible to own, except one -- the 1933 Double Eagle -- cannot be justified by any policy or other rationale. More importantly, the 1954 Treasury Order by its plain terms certainly does not exempt the 1933 Double Eagle from its reach.

The weakness of the government's position is illustrated by their final argument that "Fenton's reliance on the 1954 Treasury Order again exposes the fallacy pervading his analysis of this case -- that 1933 $20 Double Eagles fall into the category of gold coin 'having a

recognized special value to collectors of rare and unusual coin.'" (See Br. at 60.) The government's suggestion that the 1933 Double Eagle does not have recognized special value to collectors of rare and unusual coin is profoundly wrong. Indeed, in the very complaint underlying this action, the government alleges that "any extant 1933 'Double Eagle' $20 gold coin is considered within the numismatic community to be one of the rarest and most valuable United States coins." (See Forfeiture Compl. ¶ 4).

In sum, the government cannot establish probable cause that the it has maintained an ownership interest in Mr. Fenton's 1933 Double Eagle in light of this 1954 Treasury Order.

2. In 1965, Congress Passed Legislation Reaffirming That The 1933 Double Eagle Is Legal Tender

Similarly, the government incorrectly argues that the 1965 Coinage Act simply provides that all United States coins and currency are legal tender regardless of the date of issuance. In fact, the Act states that "[a]ll coins and currencies of the United States . . . . regardless of when coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues. (See Coinage Act of 1965, § 102 (July 23, 1965), attached as Exh. JJ to the Berke Decl.). While the government may dispute whether the 1933 Double Eagle was issued, it has no basis to question that the 1933 Double Eagle was "coined." As a result, under the legislation that applies to coins "regardless of when coined or issued," the 1933 Double Eagle is legal tender.

The Government's attempt to take this Court down a slippery slope by suggesting that if Mr. Fenton's position that the statute should be given its plain meaning is followed, than "any round disk-like object manufactured by the United States which could be said to look like a coin is 'coined' and therefore, under the Coinage Act of 1965 is legal tender. . . . " should be

rejected. (See Br. at 62). Once again, the government's extremist position is not supported by the facts or the law. Under the Coinage Act of 1965, only a coin minted by the government that was authorized pursuant to Article I, § 8 of the Constitution can be described as having been "coined." The 1933 Double Eagle is such a coin.

In addition, it is of no moment that the House Report accompanying this provision stated that this provision was not intended to change the law reflected in the May 12, 1933 Coinage Act, or that this provision is not in the current wording of the statute. For our purposes, the important issue is whether at any time between 1933 and the present, the government took any action that affected the status of the 1933 Double Eagle. Whether intended or not, the effect of the 1965 Coinage Act was to render all coins minted by the government legal to own. It is not Mr. Fenton's position that Congress' intent in passing the Coinage Act was to "implement a sea change in the law concerning legal tender," (see id. at 64), or to render the 1933 Double Eagle legal to own. Rather, the government's own argument that Congress did not contemplate the 1933 Double Eagle in passing the law proves Mr. Fenton's position. The government cannot have intended to exclude this one coin from the plain language of the statute if it did not even consider it.

II

SUMMARY JUDGMENT MUST BE GRANTED BECAUSE MR. FENTON'S 1933 DOUBLE EAGLE WAS NOT IMPORTED BY MEANS OF A KNOWINGLY FALSE STATEMENT IN VIOLATION OF 18 U.S.C. SECTION 542

In the government's desperation to salvage its claim that Mr. Fenton imported his 1933 Double Eagle by means of a knowingly false statement, the government has acted in a manner that can only be described as shameless. The government first alleged that the basis for its false statement claim was that Mr. Fenton purposely misstated the date of his 1933 Double

Eagle when importing it. Then, the testimony of customs broker Larry Baker of Jet Air Services, Inc. ("Jet Air") clearly established that the challenged statement had not been made by Mr. Fenton, but instead was innocently made by Mr. Baker. Rather than dismiss its claim as the facts require, the government has attempted to offer a new theory supported only by the government's imagination and stubborn refusal to admit that it was wrong in alleging that Mr. Fenton imported his coin by means of a false statement. That theory is so convoluted and far-fetched that it must be offered for the sole purpose of stalling the dismissal of this claim by attempting to manufacture a factual dispute that simply does not exist.

In a similar vein, the government has reneged on its commitment to the Honorable John S. Martin, Jr. that it had fully disclosed the basis for its false statement claim, and has offered for the first time in this 3½-year old litigation, and only in response to our motion for summary judgment, a new basis for its false statement claim. The government now sheepishly asserts that the basis for its false statement claim is Mr. Fenton's listing of a value for his 1933 Double Eagle based on the purchase price of the coin. Even putting aside that the government is legally barred from offering this new claim, the claim fails as a matter of fact and law.

A. The Undisputed Facts Clearly Establish that Mr. Fenton Did Not Knowingly Make A False Statement In Connection with the Importation of His 1933 Double Eagle

1. The Government's New Theory that Mr. Fenton Orchestrated the Importation of His 1933 Double Eagle to Take Advantage of A Non-Essential Document Used by Jet Air is Wholly Unsupported and Absurd

The government now concedes, as it must, that Mr. Baker's testimony establishes that the document the government previously claimed had been created by Mr. Fenton to conceal he was importing a 1933 Double Eagle was, in fact, a boilerplate form used by Mr. Baker to

avoid a merchandise processing fee. Nevertheless, the government stubbornly argues that Mr. Baker's testimony "does not pose an undisputed defense" to its false statement claim. (See Br. at 67-68). The government proceeds to parse Mr. Baker's testimony to come up with a "connect-the-dots" argument that appears to be the following: Because Mr. Fenton used Jet Air previously, it can be "inferred," (id. at 71), that Mr. Fenton may have known about this document and planned his importation of the coin to take advantage of Mr. Baker's use of the standard boilerplate document describing the coins as bearing dates between 1830 and 1932. The government makes this claim even though Mr. Baker testified, and the government does not dispute, that Mr. Fenton was not required to provide the dates of any of the coins he was importing and, in fact, he was not required to even use a merchandise affidavit. The government's speculative and unsupported argument is wholly insufficient to defeat Mr. Fenton's summary judgment motion on this claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986) ("to defeat summary judgment the non-movant must go beyond the pleadings and provide prima facie evidence supporting its claim").

Nevertheless, to leave no doubt as to the absurdity of the government's new theory, the supplemental declarations of Mr. Fenton and James Brown, a Knightsbridge Coins employee, reaffirm that Mr. Baker never sent a copy of his boilerplate form to Knightsbridge Coins or otherwise informed Mr. Fenton or anyone else at Knightsbridge Coins that he used such a document.

Mr. Fenton confirms that prior to the importation of his 1933 Double Eagle on February 7, 1996, he had never "received a copy of a document identical to, or even remotely similar to, the Jet Air document." (Supplemental Declaration of Stephen C. Fenton ¶ 2). In addition, Mr. Fenton previously declared that he had never seen the boilerplate form used by

Jet Air prior to receiving the forfeiture complaint, nor did he know that Jet Air submitted a document of this type. (Fenton Decl. ¶ 6). Knightsbridge Coins employee James Brown provides the final nail on the coffin in which the government's disingenuous false statement theory should be buried by declaring the following:

- since 1980, he has been responsible for "maintaining all the paperwork related to Knightsbridge Coins' purchase, sale, import and export of coins, bank notes and other numismatic material," including reviewing all the mail, maintaining all document files and preparing invoices and other documentation;
- as part of his regular practice, he reviewed the documents sent by customs brokers, including Jet Air ;
- he had never previously seen the Jet Air standard document underlying the government's claim;
- in every instance that Knightsbridge Coins has used Jet Air to assist it with the Customs process, "neither Jet Air nor any employee of Jet Air ever provided a document identical, or even similar, to the document [in question]; and
- no employee of Jet Air, or anyone else, ever stated that Jet Air used such a document.

(Declaration of James Brown ¶¶ 2, 3 and 6).

This uncontroverted proof overwhelms the government's new claim, and leaves no doubt that Mr. Fenton was not responsible for, nor aware of, Mr. Baker's use of the challenged boilerplate form. While the government's other far-fetched arguments offered in support of this claim are therefore of little moment even if they had merit, those claims, in fact, are frivolous.

The government argues that if Mr. Fenton had reason to question the legal status of the coin, that gave him a motive "for falsifying importation documents." This point is easily disposed of since it is undisputed that Mr. Fenton was not required to provide any information

regarding the dates of the coins being imported. As a result, regardless of his views as to the legal status of his 1933 Double Eagle, he would have had no incentive to provide information not required by Customs, and then do so falsely.

On this same theme, the government points to an alleged statement by Jasper Parrino made in response to the government's informant asking how the coin would be brought into the country. Mr. Parrino allegedly told the government's informant that the coin would be in either a roll of bullion or in a mislabeled set of coins. The government then wrongly and misleadingly claims that Mr. Fenton asserted his Fifth Amendment rights in response to a question regarding this statement. (See Br. at 71-72).

In fact, after Mr. Fenton's first day of testimony on August 3, 1999, the Court held a hearing regarding the adequacy of the government's immunity in light of Mr. Fenton's invocation of his Fifth Amendment rights. At that hearing, the Court permitted Mr. Fenton to provide answers to questions to which he previously had asserted his Fifth Amendment rights in light of the Court's ruling. On the second day of Mr. Fenton's testimony, Assistant United States Attorney Jane A. Levine began by recognizing that:

> we had a conference with the Judge yesterday, and at the conclusion of that conference Mr. Berke expressed a desire to come back and possibly answer certain questions to which you had invoked the Fifth Amendment yesterday. That's the purpose of this. I am going to proceed with certain questions that I understand you might be willing to provide answers to.

(August 4, 1999 Deposition Transcript of Mr. Fenton at 210, attached as Exh. B to the Berke Suppl. Decl.). As we agreed, Ms. Levin then asked Mr. Fenton a series of questions related to whether he discussed with Mr. Parrino any issues regarding how he would be importing the coin

in the United States or any difficulties he anticipated. (Id. at 277-278). Mr. Fenton testified that he had no such discussions with Mr. Parrino:

By Ms. Levine:

Q: Mr. Fenton, did you have any discussion with anyone about how you would be bringing or how you would bring the 1933 Double Eagle into the United States?

A: No.

* * * * * *

Mr. Berke: Then other than Mr. Brown, did you discuss any of those aspects of your importation of the coin with anyone else?

The Witness: Besides Jet Air, no.

By Ms. Levine:

Q: Did you discuss any issues relating to bringing the coin into the United States with Mr. Perino?

A: No.

Q: Did you have any discussions with Mr. Perino about bringing the coin into the United States?

A: Is that the same question or a different way? It's the same answer. No, I didn't.

* * * * * *

Q: Did you discuss with Mr. Perino at any time any difficulties that might arise in bringing the 1933 Double Eagle into the United States?

A: No.

(Id.). As a result, the government's presumably inadvertent claim that Mr. Fenton invoked his Fifth Amendment rights regarding these questions is simply wrong.[12] To insure that there is no confusion, however, Mr. Fenton makes clear in his supplemental declaration that he never made such a statement:

> Prior to importing my 1933 Double Eagle gold coin in February, 1996, I never told or otherwise informed, or even suggested to, anyone, including Jasper Parrino, that I would be importing the coin by means of a misdated invoice. In addition, I never was told or otherwise informed that anyone, including Mr. Parrino, ever stated or intended to represent that I would be using such a document. In fact, I knew prior to February, 1996 that I would not need to use any invoice regarding the 1933 Double Eagle, or provide any information regarding the date of the coin.

(Fenton Suppl. Decl. ¶ 3).

The uncontroverted testimony and sworn statements establish that the government's theory has no basis in fact. Moreover, while the government's speculation is insufficient to defeat summary judgment, even that guesswork is unreliable since the premise underlying it is squarely refuted by the sworn statements of Messrs. Fenton and Brown.

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12 The government asserts that Mr. Paring's invocation of his Fifth Amendment rights may be used against Mr. Fenton without further elaboration. (See Br. at 72-73). In fact, the case upon which the government relies for this proposition, LiButti v. United States, 107 F.3d 110, 120-24 (2d Cir. 1997), makes clear that a non-party's assertion of his Fifth Amendment rights may lead to an adverse inference being drawn against a party only in very limited circumstances, such as when there is a close bond between the party and the non-party and the party exercises control over the non-party. (See id. at 123). Such circumstances are clearly not present here. As a result, the government is again flatly wrong in arguing that Mr. Parrino's invocation of his Fifth Amendment rights could somehow be held against Mr. Fenton. Moreover, the government has the exclusive power to grant even limited immunity to a witness and could, if it so desired, grant such immunity to Mr. Parrino on the sole question of whether Mr. Fenton told him anything regarding the manner in which he intended to import his 1933 Double Eagle. Mr. Fenton is confident that if the government did so, Mr. Parrino also would have to answer that question in the negative.

2. The Government's New Claim that Mr. Fenton's Understated the Value of His 1933 Double Eagle is Legally Barred and Plainly Wrong As A Matter of Fact and Law

The government only cursorily argues that the false statement underlying its claim relates to Mr. Fenton's valuation of the imported coins because it knows that this newly-minted argument is legally barred as well as insufficient as a matter of fact and law.

The government's third amended complaint makes crystal clear the basis for its false statement claim:

> Specifically, Fenton and/or Knightsbridge Coins or its authorized agent falsely stated, on a letter submitted to United States Customs in connection with the entry of the defendant-in-Rem gold coin, that Knightsbridge Coins was importing only "legal tender U.S. Gold Coins Minted by the United States Government between 1830 and 1932."

(Third Amended Forfeiture Complaint ¶ 26). Indeed, the government specifically identified the false statement that forms the basis of its claim to comply with Judge Martin's Order that it do so, as well as the mandate of Rule E(2)(a) of the Supplemental Rules For Certain Admiralty and Maritime Claims. (See Berke Decl., Ex. C at 4).

The Supplemental Rules govern actions in rem such as civil forfeiture proceedings. See Supplemental Rule C. Supplemental Rule E(2)(a) requires that a forfeiture complaint state the circumstances under which the claim arises with far greater particularity than an ordinary complaint. See United States v. Daccarett, 6 F.3d 37, 47 (2d Cir. 1993) ("These standards are more stringent than the general pleading requirements set forth in the Federal Rules of Civil Procedure, an implicit accommodation to the drastic nature of the civil forfeiture remedy.") (citation omitted). These rules impose an "exacting particularity standard applicable to forfeiture actions [that] 'is not merely a procedural technicality', but is, instead, a significant

legal rule designed to curb excesses of government power and afford property owners some protection from the harshness of a forfeiture's attendant sanctions." United States v. One Parcel of Real Property, Known as 384-390 W. Broadway, 964 F.2d 1244, 1248 (1st Cir. 1992) (citation omitted).

It is not surprising that the government commits only three sentences to its throw-away argument that the basis for its claim is the listed valuation of the 1933 Double Eagle given that it has represented for the past 3½ years that the sole basis for its false statement claim was the Jet Air boilerplate document listing the dates of the coins being imported. (See Br. at 73-74). The argument is clearly improper in light of the specific allegations of the complaint, the Order of Judge Martin and the dictates of Supplemental Rule E(2).

Even if that were not the case, the government's position is meritless. As Mr. Baker, a customs broker for over 30 years, made clear in his unchallenged testimony, the approximate value of imported merchandise that should be listed relates to the purchase price paid for the merchandise by the importer. (Baker Dep. at 75-76). Specifically, Mr. Baker testified:

By Mr. Berke:

Q: So, would it be fair to say that for all the information that you would need regarding the coins to handle all the paperwork for their importation is contained in the invoice, Page 2 of Government's Exhibit 4?

A: That is correct.

Q: And, by the way, the value, does that refer to the purchase price: in other words, the amount of money paid for the coins by the person bringing them in or the company bringing them in, or does that refer to a resale value of what they could possibly be sold for?

A: Since it is not stated, the assumption is that it's a purchase price.

Q: And it's your understanding that that is a proper way of designating the value for purposes of importing, for importing merchandise?

A: That is correct.

(Id. (emphasis added)). Mr. Fenton's actions were entirely in accord with this obligation. As Messrs. de Clermont and Fenton made clear in their testimony (and the actual documentation supports), Mr. Fenton paid approximately $220,000 for the Farouk 1933 Double Eagle and a number of other less significant United States gold coins. (de Clermont Dep. at 254-58; Fenton Dep. at 254-255). The government concedes this fact. In his testimony, Mr. Fenton explained that he listed the value of the coins being imported on February 6, 1966 at $742,000, using a valuation for the 1933 Double Eagle derived from the purchase price. (Id. at 289). Moreover, even putting aside that the purchase price was the proper standard to be used for valuation purposes, the government incorrectly characterizes Mr. Fenton's dealings with Mr. Parrino. While the government trumpets the price of $1.5 million that its agents and informant discussed with Mr. Parrino as a price they might have been willing to pay for the coin, it neglects to even mention that Mr. Fenton made clear in his testimony that the only possible sale price he ever discussed with Mr. Parrino was $825,000 (he had no direct discussions with anyone else regarding a possible price). (Id. at 287-289). More importantly, Mr. Fenton made clear that while the sale had been discussed, it had not been concluded when Mr. Fenton traveled to the

United States. (Id.) As Mr. Fenton explained, he did not know what price the buyer would be willing to pay, if any, after inspecting the coin and its condition. (Id.)

As a consequence, even ignoring that the government is not permitted to raise this newly manufactured false statement claim for the first time in its response to Mr. Fenton's summary judgment motion, that claim has no basis in fact or law -- which, of course, also explains the reason the government did not raise this claim at the outset.

B. The Government Cannot Prove That the False Statement Was Material

The government's premise upon which it bases its materiality argument is simply incorrect. The government argues that even though Mr. Fenton was not required to disclose the dates of any coins he was importing, it is nevertheless material that he didn't disclose the date "1933" because "the invoice falsified the most significant information being given -- the very identify of the gold piece being imported. The date "1933" earmarks a U.S. gold piece as stolen property, and therefore is plainly material." (Br. at 76 (emphasis added)). In fact, 1933 does not earmark a United States gold coin as stolen property. The government's own documents make clear that 1933 gold coins were, in fact, paid out. As a May 27, 1965 United States Mint Memorandum makes clear, at minimum, 1933 $10 Eagles were issued to the public: "Prior to the issuance of the first gold orders in March of 1933, 100 eagles ($10) had been delivered to the Treasurer of the U.S., probably for sale over the counter to the public, and one had been paid out at the Philadelphia Mint. No list has been found indicating to whom these were paid out." (Berke Suppl. Decl., Exh. I). This information is confirmed by numerous sources, including numismatic guidebooks indicating that many 1933 Eagles were released to the public. (See Buyer's Guide to United States Gold Coins, Q. David Bowers (showing that 1933 Eagles

received its highest ranking for appearances in good condition at public auctions -- more than 12), attached as Exh. J to Berke Suppl. Decl.).

It is not surprising that the government relies on this false assertion to make its materiality argument because it has no other basis for its claim. The primary case upon which it relies, United States v. An Antique Platter of Gold, 184 F.3d 131, 135 (2d Cir. 1999), cert. denied, 120 S. Ct. 978 (2000), provides a revealing contrast. In that case, there was a specific customs directive requiring customs officials to determine whether the property was subject to a claim of foreign ownership and to seize that property. Id. at 136. In order to determine whether an antiquity is subject to such a claim of foreign ownership, the customs official needed to know the country of origin to ascertain which laws apply -- the precise information that was false. Id. By contrast, in the instant case, the government has not offered any customs consideration to which the date of a coin being imported was relevant.

In fact, the government's claim that information regarding the dates of the gold coins being imported would affect the Custom's Service's decision-making process is not supported by a single customs directive, rule or regulation. Because the government has offered nothing to support its claim that the Customs Service process could have been influenced in any way by referring to the gold coins as bearing dates between 1830 and 1933 as opposed to between 1830 and 1932, summary judgment must be granted. The government's final claim that the question of materiality cannot be resolved in a motion for summary judgment is also a disingenuous argument since in An Antique Platter of Gold, 184 F.3d at 131, the government moved for summary judgment regarding the materiality of the statement in that case, and prevailed.

CONCLUSION

Summary judgment should be granted dismissing the third amended complaint. No facts support the government's forfeiture claims seeking to divest Mr. Fenton of his 1933 Double Eagle. As a result, the drastic remedy of forfeiture may not be pursued and the coin should be returned to Mr. Fenton.

Dated: New York, New York
March 17, 2000

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CERTIFICATE OF SERVICE

I hereby certify that the Reply Memorandum of Law In Support Of Claimant Stephen C. Fenton's Motion for Summary Judgment, dated March 17, 2000, was caused to be served in accordance with Rule 5, Federal Rules of Civil Procedure, on the 17th day of March, 2000, by serving a true copy on the following by hand:

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